



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 30, 1995

Mr. Jerry E. Drake, Jr.  
Assistant City Attorney  
City of Denton  
Municipal Building  
Denton, Texas 76201

OR95-1322

Dear Mr. Drake:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34178.

The City of Denton (the "city") received a request for:

A written report from a May 31, 1993, incident in which police officers Larry Kish and Shane Kizer were called to 114 West Hickory Street and subsequently arrested William Levonitis.

The two arresting officers' personnel files, including results of an internal affairs investigation into Officer Kish's criminal assault and retaliation charges and subsequent plea bargain, and the circumstances of his leaving city employment.

You state that the requestor has been given access to the personnel files required to be maintained under section 143.089(a) of the Local Government Code, with the exception of certain confidential information. You further state that you have no information relating to the officer's leaving city employment because he has not left that employment. The Open Records Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 (1986) at 3. Additionally, you state that the city does not have

any information relating to criminal charges or disposition of those charges against the officer. We note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990). You claim that the remainder of the requested information is excepted from disclosure under sections 552.103(a) and 552.108 of the Government Code and section 143.089 of the Local Government Code.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the suspect has filed a civil lawsuit complaining about his arrest, and have provided us with a copy of that complaint. You also inform us that criminal charges are pending against this suspect. We conclude that civil litigation is pending and that exhibits 4(a), (b), (c), (d), and (e) relate to that pending civil litigation. Consequently, the city may withhold exhibits 4(a), (b), (c), (d), and (e), with the exception of the information that generally appears on the first page of an offense report.<sup>1</sup>

You claim that section 552.103(a) should also except the first-page offense report information. This office has previously addressed that contention. In Open Records Decision No. 597 (1991), this office concluded that, although 552.103(a) may except first-page offense report information in some circumstances, after the magistrate informs the suspect of the nature of the charge against him, there is no first page information that

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<sup>1</sup>As we have held that section 552.103 applies to except the requested information from required public disclosure and section 552.108 would also not except information generally found on the first page of an offense report, we need not address the application of section 552.108 to the requested information.

would not have been made known to him by the magistrate. Open Records Decision No. 597 (1991) at 3. It is clear from the submitted documents that, in this case, the suspect was arrested and appeared before a magistrate who informed him of the basic details of the alleged offense, which is the information typically found on the first page of an offense report. When the opposing party in the pending litigation has seen or had access to any of the information at issue, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). We enclose for your convenience a summary of the type of information that must be disclosed. Although this information is generally found on the first page of an offense report, its location is not determinative. To determine what information must be released, the type of information must be examined rather than its location. See Open Records Decision No. 127 (1976) at 5. Therefore, we conclude that section 552.103(a) does not in this instance except the information that generally appears on the first page of an offense report from required public disclosure.<sup>2</sup>

The request also seeks "results of an internal affairs investigation into Officer Kish's criminal assault and retaliation charges." You claim that such information is protected by section 143.089 of the Local Government Code. Section 143.089 of the Local Government Code works in conjunction with section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g). You inform us that you have previously provided the requestor access to the officers' personnel files required to be maintained by the civil service department under section 143.089(a) with certain information withheld.<sup>3</sup> Therefore, we are considering only those files which may be maintained by the police department for its own internal use under section 143.089(g).

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<sup>2</sup>Section 552.103(a) will not apply to except the remainder of exhibits 4(a), (b), (c), (d), and (e) from disclosure once the opposing party has seen the documents. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

<sup>3</sup>We note that sections 552.101 and 552.117 of the Government Code allow a governmental body to withhold a peace officer's home address and home telephone number, as well as information protected by constitutional and common law privacy. We understand that the city withheld only confidential information from the requestor.

Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. In cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the personnel files maintained under section 143.089(a). Such records may not be withheld under section 552.101 of the act. Local Gov't Code § 143.089(f); Open Records Decision No. 562 (1990) at 6.

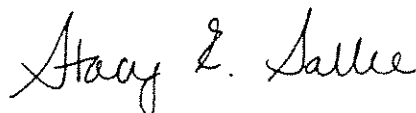
You have not submitted any personnel files maintained under section 143.089(g) to us for review, and we are therefore unable to determine whether any internal investigation resulted in disciplinary action. We note, however, that if the investigation did not result in disciplinary action, information maintained by the police department that relates to such investigations must be withheld from required public disclosure under section 552.101 of the act in conjunction with section 143.089(g) of the Local Government Code.<sup>4</sup> However, if any of the internal affairs investigations did result in disciplinary action, then "any record, memorandum, or document relating to" the disciplinary action must be placed in the personnel files maintained by the civil service commission under section 143.089(a) and must be released by the civil service commission under section 143.089(f) of the Local Government Code.

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<sup>4</sup>We also note that section 143.089(g) requires a police department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/RHS/rho

Ref.: ID# 34178

Enclosures: Summary of Open Records Decision No. 127 (1976)  
Submitted documents

cc: Ms. Donna Fielder  
Denton Record-Chronicle  
314 East Hickory  
Denton, Texas 76202  
(w/o enclosures)